Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978.

No. 78-1925.

MILLER & SON PAVING, INC.,

Petitioner,

v.

WRIGHTSTOWN TOWNSHIP CIVIC ASSOCIATION, GEORGE DONAT, MARGARET PERRY, FRANK VIRNELSON, and HARRISON E. DOW, ALDANLEE SPELL, and N. KLINE FISHER, Individually and as Supervisors of Wrightstown Township, Bucks County, Pennsylvania, and WRIGHTSTOWN TOWNSHIP,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF IN OPPOSITION BY RESPONDENTS WRIGHTSTOWN TOWNSHIP CIVIC ASSOCIATION, GEORGE DONAT, MARGARET PERRY AND FRANK VIRNELSON.

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BRIEF IN OPPOSITION BY RESPONDENTS WRIGHTSTOWN TOWNSHIP CIVIC ASSOCIATION, GEORGE DONAT, MARGARET PERRY AND FRANK VIRNELSON.

Respondents Wrightstown Township Civic Association, George Donat, Margaret Perry and Frank Virnelson respectfully request that this Court deny a writ of certiorari to review the *per curiam* judgment and opinion of the United States Court of Appeals for the Third Circuit entered on April 2, 1979 and set forth in full in the Petition at Appendix B.

OPINIONS BELOW.

The opinions below are printed in Petitioner's Appendices B and D.[1]

JURISDICTION.

The jurisdictional requirements are adequately set forth in the Petition at page 2.

QUESTIONS PRESENTED.

I. Whether this Court should grant a writ of certiorari to review the Court of Appeals' decision affirming the dismissal of Count I of plaintiff's complaint alleging violations of Section 1 of the Sherman Act, 15 U. S. C. § 1, for failure to state a claim upon which relief can be granted, where plaintiff's complaint does not and cannot allege that any of the defendants (who are a Township, its Supervisors, the Township Civic Association and Township residents) had a commercial interest in the activities at issue.

II. Whether this Court should grant a writ of certiorari to review the Court of Appeals' decision affirming the dismissal of that part of Count II of plaintiff's complaint alleging violations of Section 1 of the Civil Rights Act of 1871, 42 U. S. C. § 1983, and the Fourteenth Amendment to the United States Constitution, for failure to state a claim upon which relief can be granted, where plaintiff's complaint does not and cannot allege any deprivation of a constitutional right under the pleaded facts and where plaintiff never raised before the district court its latest theory of liability under the Civil Rights Act of 1871.

1. All references in this brief to portions of the "Appendix" refer to Petitioner's Appendix.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The statutes and ordinances involved, other than those set forth in the Petition at pages 2 and 3, include:

First Amendment to the United States Constitution.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

53 Pa. Stat. Ann. § 10609 (Purdon's).

For the preparation of amendments to zoning ordinances, the procedure set forth in this article for the preparation of a proposed zoning ordinance shall be permissive. Before voting on the enactment of an amendment, the governing body shall hold a public hearing thereon, pursuant to public notice. In the case of an amendment other than that prepared by the planning agency, the governing body shall submit each such amendment to the planning agency at least thirty days prior to the hearing on such proposed amendment to provide the planning agency an opportunity to submit recommendations. If, after any public hearing held upon an amendment, the proposed amendment is revised, or further revised, to include land previously not affected by it, the governing body shall hold another public hearing, pursuant to public notice, before proceeding to vote on the amendment. If a county planning agency shall have been created for the county in which the city, borough, incorporated town or township adopting the ordinance is located, then at least thirty days prior to the hearing on the ordinance by the local governing body,

the city, borough, incorporated town or township planning agency shall submit the proposed ordinance to the county planning agency for recommendations.

COUNTERSTATEMENT OF THE CASE.

Plaintiff Miller & Son Paving, Inc. ("Miller"), a corporation engaged in the quarrying of stone in Wrightstown Township, Bucks County, Pennsylvania, brought this action on August 5, 1977 in the United States District Court for the Eastern District of Pennsylvania against the Wrightstown Township Civic Association ("Association"), George Donat, Margaret Perry and Frank Virnelson ("private defendants") and Harrison E. Dow, Aldanlee Spell, N. Kline Fisher and Wrightstown Township ("public defendants") alleging violations of Section 1 of the Sherman Act (15 U. S. C. § 1) (Count I) and Sections 1, 2 and 6 of the Civil Rights Act of 1871 (42 U. S. C. §§ 1983, 1985(3) and 1986) (Count II). Private defendants Donat, Perry and Virnelson are residents of Wrightstown Township. Public defendants Dow, Spell and Fisher are the Supervisors of Wrightstown Township. Miller alleged that a conspiracy among the private and public defendants, which has resulted in the denial of the rezoning of 12.853 acres adjacent to plaintiff's present quarry for use in additional quarrying activities, constitutes a restraint of trade in violation of Section 1 of the Sherman Act and a deprivation of constitutional rights in violation of the Civil Rights Act of 1871 and the Fourteenth Amendment to the United States Constitution.

As the Court of Appeals' decision states, Miller's claims are based on following alleged actions by the defendants with respect to Miller's quarrying activities:

> "the entry of a cease and desist order by the Township Supervisors in response to a complaint from the Civic Association that [Miller] had violated the Township's zoning ordinance in the operation of its quarry; the denial by the Supervisors of [Miller's] request, which was opposed by the Civic Association, for the rezoning of an additional tract of land owned by [Miller] to permit the conduct of quarrying thereon; and the filing of an administrative appeal by the Supervisors, allegedly on behalf of the Civic Association, from an order of the Pennsylvania Department of Environmental Resources, granting [Miller] a surface mining permit and mine drainage permit." (Appendix, pp. A5-A6)

Plaintiff nowhere alleges that any defendant had any commercial relationship to plaintiff or any commercial interest in the quarrying of stone. Moreover, there is no allegation that the alleged actions were contrary to the community's general welfare.

Upon consideration of briefs and oral argument supporting and opposing defendants' motions to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the district court granted defendants' motion. The trial court dismissed Miller's Sherman Act claim because of the admitted inability to allege any commercial relationship or purpose to defendants' purported actions. Miller's civil rights claim[2] was dismissed for failure to plead, or have any ability to plead under the alleged facts, a deprivation of constitutional rights.

The Court of Appeals for the Third Circuit heard oral argument on Miller's appeal of this decision on March 22, 1979. On April 2, 1979, the Court issued a *per curiam* decision affirming the district court on substantially the

2. Plaintiff's claims under 42 U. S. C. §§ 1985(3) and 1986 were never defended by plaintiff before the district court and the dismissal of those claims was not the subject of appeal.

same grounds relied upon by the lower court. The Court of Appeals also noted that Miller had attempted to argue a new theory concerning its claim under § 1983 which had never been raised in Miller's complaint, briefs or oral argument before the district court. The Court rejected this effort to raise new issues but also went on to deal with the legal inadequacy of the complaint. Several additional grounds for dismissal were briefed and argued to both the trial and appellate courts but neither court found it necessary to reach those issues in dismissing the complaint.

REASONS WHY THIS WRIT SHOULD BE DENIED.

The petition does not merit review by this Court because the Court of Appeals' decision does not conflict with this Court's prior decisions or the decisions of other courts of appeals and none of petitioner's contentions raise substantial legal issues.

I. The Sherman Act Claim.

District Judge McGlynn very accurately described the factual allegations in this case as amounting "to nothing more than a local zoning dispute" (Appendix, p. A15). In essence, plaintiff alleges that the private defendants sought to have the responsible Township authorities enforce the Township zoning ordinance and oppose rezoning of 12 acres of land which Miller had bought with the presumption that no one would care if the quarry were expanded.

Miller was wrong. The Township residents did fight because of the environmental and aesthetic nuisances created by the quarry and its threatened expansion. The dispute continues today, not only in this Court but in the Commonwealth Court of Pennsylvania and the Common Pleas Court of Bucks County, Pennsylvania. Miller has already won one battle with regard to its mining permits before the Environmental Hearing Board. In short, Miller has vigorously pursued a panoply of state court remedies which have brought vindication for both sides of the zoning dispute.

In Miller's federal court action, which seeks relief and raises issues virtually identical to those before the state courts, Miller alleges that defendants have conspired to destroy its business. Regardless of the truth of these allegations, there has always been agreement that defendants' motivations were totally non-commercial. Nowhere

in the record has Miller even suggested that any defendant or alleged co-conspirator might have the slightest interest in the price or marketing of quarry stone. As such, this zoning dispute is unquestionably political.

In this context, this Court and many other federal courts have determined that the Sherman Act has no applicability. Since *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 493 and n. 15 (1940), this Court has stated that the Sherman Act was intended to control problems of "business competition". The *Apex* ruling was explained in *Klor's v. Broadway-Hale Stores*, 359 U. S. 207, 213 n. 7 (1959):

> "*Apex* recognized that the [Sherman] Act aimed at combinations having commercial objectives and applied only to a very limited extent to organizations, like labor unions, which normally have other objectives."

This doctrine was reiterated in *Eastern R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U. S. 127, 141 (1961), in which opinion the Court found no Sherman Act liability where competitors allegedly sought to destroy plaintiff through attempts to influence the enforcement or passage of laws. The Court's succinct statement answers Miller's Petition here:

> "The proscriptions of the [Sherman] Act, tailored as they are for the business world, are not at all appropriate for application in the political arena." (365 U. S. at 141).

Surely, if this doctrine, based on the First Amendment, applies to protect businessmen motivated by desires to destroy their competition, it should *a fortiori* apply where there is not the slightest commercial relationship or purpose alleged as to the defendants.

Federal district courts and courts of appeals have consistently reached this conclusion in every such case where the activities were outside the commercial arena. In *Marjorie Webster Junior College v. Middle States Association of Colleges and Secondary Schools, Inc.*, 432 F. 2d 650 (D. C. Cir.), *cert. denied*, 400 U. S. 965 (1970), the Court of Appeals dismissed the complaint where defendant's services in accrediting colleges was of a totally noncommercial nature. In two recent decisions by the Court of Appeals for the First Circuit, *Donnelly v. Boston College*, 558 F. 2d 634 (1st Cir. 1977) and *Council for Employment and Economic Energy Use v. WHDH Corp.*, 580 F. 2d 9 (1st Cir. 1978), *cert. denied*, 47 U. S. L. W. 3586 (1979), identical reasoning was applied to protect from antitrust scrutiny the law school admissions process and the application of the fairness doctrine to political opponents by the electronic media. Most recently, in *State of Missouri v. National Organization for Women, Inc.*, 467 F. Supp. 289 (W. D. Mo. 1979), the Court reviewed this body of law and dismissed plaintiff's Sherman Act claim based on defendant's boycott campaign against states that had failed to ratify the Equal Rights Amendment.

Thus, the federal courts have consistently applied the fundamental principle that the Sherman Act was intended to police the commercial arena, not the political arena. That principle has never been violated in any antitrust case of which the private defendants are aware. No federal court has found Sherman Act liability unless at least one defendant or co-conspirator was a competitor, customer or supplier having a commercial relationship to the plaintiff.

There is surely not the slightest reason offered by Miller to accept its novel theory proposed here. Indeed,

if Miller's theory were adopted, every political movement which sought to affect some business would be threatened with serious antitrust liability. That threat is inconsistent with the First Amendment and should be stopped, as it has been by the federal courts, before the lengthy processes of discovery and trial are permitted to chill the exercise of fundamental rights to petition the government.[3] *Franchise Realty Interstate Corporation v. San Francisco Local Joint Executive Board*, 542 F. 2d 1076, 1082 (9th Cir. 1976), *cert. denied*, 430 U. S. 940 (1977).

II. The Claim of Deprivation of Constitutional Rights.

Miller attempts to frame its attack on the dismissal of its claim of deprival of constitutional rights by focusing on what is known as the *Rotolo-Negrich* rule set forth by the Court of Appeals for the Third Circuit in *Rotolo v. Borough of Charleroi*, 532 F. 2d 920 (3d Cir. 1976) and *Negrich v. Hohn*, 379 F. 2d 213 (3d Cir. 1967). That rule requires that because federal court jurisdiction is based upon a claimed deprivation of a federal constitutional or statutory right, facts must be pleaded which set forth such a deprivation with more than a mere parroting of the words of the statute. While Miller's complaint does fail because of its failure to plead facts with any specificity, it fails for a more fundamental reason. Petitioner failed to present its current argument in any pleading, brief or oral argument presented to the district court.

Miller's Petition to this Court totally ignores one of the Court of Appeals' bases for its affirmance of the dismissal. Miller had argued to the Court of Appeals that it had stated

3. Another reason for dismissal of Miller's antitrust action, the state action exemption embodied in *Parker v. Brown*, 317 U. S. 341 (1943) and its progeny, was argued to both the trial court and court of appeals although not reached by either court. That doctrine remains as an alternative basis for supporting the judgment against plaintiff. *Jaffke v. Dunham*, 352 U. S. 280 (1957).

a cause of action based on a conspiracy to deny it a neutral and detached adjudication. The Court of Appeals found, after a review of the record before the district court, that such a claim was not "focused upon by plaintiff as the basis for its demand for relief under § 1983" (Appendix, p. A7).

Nowhere in Miller's Petition is there a challenge to this finding by the Court of Appeals. In any event, there would be no effective challenge to the Court's holding since Miller never claimed a deprivation of a constitutional right to a neutral adjudication until its brief to the Court of Appeals was filed. Miller's complaint simply claimed that it had been deprived of "equal protection of the laws and of equal privileges and immunities under the laws." When Judge McGlynn asked Miller's counsel to explain what constitutional deprivation was complained of, the response was simply that Miller had property rights in its quarry operation and defendants had deprived Miller of those property rights (Appendix, p. A15). It was only after defendants and Judge McGlynn had indicated to Miller the fallacy of its argument that Miller's counsel attempted to shift gears and argue a new theory never argued to the district court. This failure to articulate a theory before the district court by which plaintiff seeks reversal here alone warrants affirmance of the decisions below. *Hormel v. Helvering*, 312 U. S. 552, 556 (1941); *Singleton v. Wulff*, 428 U. S. 106, 120 (1976); *Newark Morning Ledger Co. v. United States*, 539 F. 2d 929, 932 (3d Cir. 1976).

Even if this Court were to overlook this change of theory and examine Miller's new theory, it cannot withstand scrutiny when compared to the factual allegations of the complaint. Miller's complaint challenges the actions of the Board of Supervisors in its role as the body author-

ized to determine issues of rezoning. 53 Pa. Stat. Ann. § 10609 (Purdon's).[4] The actions of a Board of Supervisors when considering such rezoning requests are "legislative". *Board of Commissioners of McCandless Township v. Beho Development Company,* 16 Pa. C. 448, 332 A. 2d 848, 851 (1975). As that decision notes, under Pennsylvania law, not even a reviewing state court may order rezoning of a parcel of land. Only the Board of Supervisors has that power in its legislative capacity.

The power of federal courts in reviewing such local decisions is even more limited. As this Court and a number of courts of appeals have held, federal courts may only review challenged zoning decisions to determine whether there has been a "clearly arbitrary and unreasonable" decision, "having no relationship to the public health, safety, morals or general welfare." *Euclid v. Ambler Realty Co.,* 272 U. S. 365, 395 (1926); *Ellentuck v. Klein,* 570 F. 2d 414, 430 (2d Cir. 1978); *Steel Hill Development, Inc. v. Town of Sanbornton,* 469 F. 2d 956, 960 (1st Cir. 1972); *Burns v. City of Des Peres,* 534 F. 2d 103, 108 (8th Cir.), *cert. denied,* 429 U. S. 861 (1976); *South Gwinnett Venture v. Pruitt,* 491 F. 2d 5 (5th Cir. *en banc*), *cert. denied,* 419 U. S. 837 (1974).

Miller makes no allegation that any state actions were arbitrary or capricious. No such allegation could have been made since it is plain even to Miller that the Supervisor's decision had a rational relationship to the environmental welfare of the community.

Miller's allegations amount to nothing more than a complaint that it lost its sought-after rezoning. There is

4. Rezoning of the 12 acre parcel has been and remains Miller's goal in its legal proceedings before this Court, before the Board of Supervisors and before the Pennsylvania state courts (Plaintiff's Complaint, ¶¶ 20-23, 26 and prayer for relief, Appendix, pp. A21-26).

no complaint that it was denied any particular procedural due process right. No such allegation could be made since Miller recognizes that it was given a full opportunity over several months to present all its arguments to the Board of Supervisors. In the end, the Supervisors made a decision.[5] That is their duty under Pennsylvania law. It so happens that the Supervisors sided with the Township's citizens. That surely does not constitute a deprivation of due process under any theory ever set forth by this Court.

Miller has brought this action, and presented it to the highest Court, to seek leverage in its litigation of identical issues before the state courts of Pennsylvania. No leverage should be granted by this Court since Miller has stated no cause of action under any theory ever accepted by this Court. Miller has raised no substantial legal issue and has pointed to no conflicting decisions among the courts of appeals.

5. The private and public defendants also argued to the district court and court of appeals that the Board of Supervisors were absolutely immune from damage liability for their actions alleged here. *Tenney v. Brandhove,* 341 U. S. 367 (1951); *Jonnet v. Bodick,* 431 Pa. 59, 244 A. 2d 751 (1968). *Cf. Stump v. Sparkman,* 435 U. S. 349 (1978). The immunity of the public defendants would also protect the private defendants from liability. *Hazo v. Geltz,* 537 F. 2d 747, 749 (3d Cir. 1976); *Hill v. McClellan,* 490 F. 2d 859, 860 (5th Cir. 1974). Neither court reached this issue in dismissing Miller's complaint (Appendix, pp. A7 and A17).

CONCLUSION.

For all the foregoing reasons, this Court should deny Miller's Petition for a Writ of Certiorari to the Court of Appeals for the Third Circuit.

Respectfully submitted,

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